Supreme Court, U.S.
FILED
NOV 1 1996
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No. 96-426

In the Supreme Court of the United States

OCTOBER TERM, 1996

PAOLO LO DUCA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WALTER DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
DOUGLAS N. LETTER
SCOTT R. MCINTOSH
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

33 pp

QUESTION PRESENTED

Whether the federal extradition statute, 18 U.S.C. 3184 *et seq.*, as applied to petitioner, violates the separation of powers doctrine or the Appointments Clause.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 93 F.3d 1100. The opinion of the district court (Pet. App. 26a-55a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 29, 1996. The petition for a writ of certiorari was filed on September 17, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the federal extradition statute, 18 U.S.C. 3184 *et seq.*, are reproduced at Pet. App. 67a-68a.

STATEMENT

The Republic of Italy has asked the United States to extradite petitioner, who stands convicted of narcotics offenses under Italian law. In accordance with the federal extradition statute, 18 U.S.C. 3184 *et seq.*, the United

States has obtained a magistrate judge's certification that petitioner is subject to extradition under the Extradition Treaty Between the Government of the United States of America and the Government of the Republic of Italy, Oct. 13, 1983, 35 U.S.T. 3023, T.I.A.S. No. 10837. Petitioner challenged his extradition by seeking a writ of habeas corpus from United States District Court for the Eastern District of New York. The district court denied petitioner's request for habeas corpus relief, and the court of appeals affirmed that decision. Petitioner seeks this Court's review based on his contention that the federal extradition statute, which has been in effect for nearly 150 years, violates the Constitution.

1. Extradition is "the surrender by one nation to another of an individual accused or convicted of an offense outside of its own territory, and within the territorial jurisdiction of the other." *Terlinden* v. *Ames*, 184 U.S. 270, 289 (1902); 6 M. Whiteman, *Digest of International Law* 727 (1968). In the United States, extradition is a "national act" performed by the Executive Branch pursuant to treaties and Acts of Congress. *Valentine* v. *United States ex rel. Neidecker*, 299 U.S. 5, 8-9 (1936); *In re Kaine*, 55 U.S. (14 How.) 103, 110 (1852) (plurality opinion). The President has power to surrender fugitives for extradition pursuant to a treaty as an incident of his treaty-making and foreign affairs powers under Article II of the Constitution. *Terlinden*, 184 U.S. at 289.

The United States entered into its first extradition agreement in 1794, as part of the Jay Treaty with Great Britain, Art. XXVII, 8 Stat. 129. See 1 J. Moore, *A Treatise on Extradition and Interstate Rendition* 89-90 (1891). Several years later, the Adams administration extradited a seaman named Jonathan Robbins to Great Britain to answer charges of mutiny. See *Kaine*, 55 U.S. (14 How.) at 111-112 (plurality opinion); R. Wedgwood, *The*

Revolutionary Martyrdom of Jonathan Robbins, 100 Yale L.J. 229 (1990). The Robbins extradition produced a public outcry based on the belief—which proved to be mistaken—that the President had surrendered Robbins to Great Britain without giving the judiciary an independent opportunity to pass on the legality of the extradition. *Kaine*, 55 U.S. (14 How.) at 112; see R. Wedgwood, 100 Yale L.J. at 286-287, 289-290, 292-304, 333-353.

The Jay Treaty expired in 1806, and the United States did not enter into another extradition treaty until 1842, when the United States and Great Britain signed the Webster-Ashburton Treaty, Aug. 9, 1842, 8 Stat. 572. The Robbins Affair had "a controlling influence" over the extradition terms of that treaty, *Kaine*, 55 U.S. (14 How.) at 112 (plurality opinion), by producing a general conviction that extradition without judicial oversight was "highly dangerous to liberty, and ought never to be allowed in this country." *Id.* at 113.

Unlike the Jay Treaty, the Webster-Ashburton Treaty expressly gave "judges and other magistrates" in both countries the "power, jurisdiction, and authority" to issue warrants for the arrest of fugitives and to hold hearings on "the evidence of criminality." Art. X, 8 Stat. 576. If a judge or magistrate found the evidence "sufficient to sustain the charge," the treaty directed the judicial officer to certify the determination to the proper executive official, "[so] that a warrant may issue for the surrender of [the] fugitive" to the requesting nation. *Ibid.* The treaty thereby ensured that a fugitive could not be surrendered for extradition without a prior determination by a judicial officer of the legality of the extradition.

Six years later, in 1848, Congress enacted the first federal extradition statute. Act of Aug. 12, 1848, ch. 167, 9 Stat. 302. The statute was intended "to enlarge the facilities to comply with our obligations" under the Webster-

Ashburton treaty and other extradition agreements. 18 Cong. Globe 868 (1848) (Rep. Ingersoll); accord *Kaine*, 55 U.S. (14 How.) at 109 (plurality opinion) (statute enacted "to secure the[] due execution" of extradition treaties). In particular, Congress sought to ensure that judicial officers would be available to issue warrants and conduct extradition hearings throughout the country, "at all times, without delay and the danger of a denial of justice." 18 Cong. Globe 868 (1848) (Rep. Ingersoll). To that end, the statute assigned authority over extradition proceedings to "any of the Justices of the Supreme Court or judges of the several District Courts," "the judges of the several State Courts," and "commissioners authorized * * * by any of the courts of the United States." 9 Stat. 302.

The extradition statute modeled the role of those judicial officers on the terms of the Webster-Ashburton Treaty. See *Kaine*, 55 U.S. (14 How.) at 110 (plurality opinion); compare 8 Stat. 576 (treaty) with 9 Stat. 302 (statute). The judicial process began with the filing of a complaint charging a fugitive with a crime covered by an applicable treaty. 9 Stat. 302. Upon the filing of the complaint, any judicial officer enumerated in the statute could issue a warrant for the fugitive's arrest. *Ibid.* Following the arrest, the judicial officer was authorized to hold a hearing to consider "the evidence of criminality." *Ibid.*; see *Kaine*, 55 U.S. (14 How.) at 114 (plurality opinion). If the judicial officer found the evidence "sufficient * * * to sustain the charge under the provisions of the proper treaty or convention," the statute directed him to issue a warrant for the fugitive's commitment pending surrender and to certify the extraditability determination to the Secretary of State, "together with a copy of all the testimony taken before him, * * * [so] that a warrant may issue * * * for the surrender" of the fugitive. 9 Stat. 302. Upon receipt of a certification of

extraditability, the Secretary of State was authorized "to order the person so committed to be delivered to" the requesting nation. *Ibid.*

The extradition statute enacted by Congress in 1848 has remained in effect, with minor changes, to the present day. See 18 U.S.C. 3184 *et seq.* The judicial procedures for arrest, hearing, certification, and commitment are now codified in 18 U.S.C. 3184. The judicial role currently may be exercised by "any justice" of this Court; any other federal judge; "any magistrate authorized so to do by a court of the United States"; or "any judge of a [state] court of record of general jurisdiction." *Ibid.*

The judicial role under the extradition statute parallels the established role of judges and magistrates in the arrest and commitment of persons charged with violating domestic criminal laws. As a plurality of the Court explained in its first decision applying the statute:

> Judges and State magistrates arrest and commit our own citizens, without exception, in all instances, and for every grade of crime and offense against our State and Federal laws; they determine on the rights of the prosecutor to commence the proceeding; on the sufficiency of the affidavit on which the warrant of arrest is founded; on the evidence of criminality after the arrest is made; and imprison or take bail preparatory to a trial in court. * * * Why, then, should a foreign criminal be more tenderly dealt by?

Kaine, 55 U.S. (14 How.) at 113-114 (plurality opinion).

The extradition hearing conducted under Section 3184 "is not * * * in the nature of a final trial by which the prisoner could be convicted or acquitted of the crime charged against him." *Benson* v. *McMahon*, 127 U.S. 457, 463 (1888); *Charlton* v. *Kelly*, 229 U.S. 447, 461 (1913). Instead, it "is essentially a preliminary examination to

determine whether a case is made out which will justify the holding of the accused and his surrender to the demanding nation." *Ward* v. *Rutherford*, 921 F.2d 286, 287-288 (D.C. Cir. 1990) (Ginsburg, J.), cert. dismissed, 501 U.S. 1225 (1991). The judicial officer who conducts the hearing "thus performs an assignment in line with his or her accustomed task of determining if there is probable cause to hold a defendant to answer for the commission of an offense" pursuant to Federal Rule of Criminal Procedure 5.1. *Ibid.*[1]

If the judicial officer finds the evidence insufficient to hold a fugitive for extradition, the extradition complaint is dismissed. In that event, the Secretary of State has no authority to override the judicial decision by ordering the surrender of the fugitive. *In re Mackin*, 668 F.2d 122, 136 (2d Cir. 1981). A new extradition request may be filed, see *Collins* v. *Loisel*, 262 U.S. 426 (1923), but unless the judicial officer certifies that the fugitive is extraditable, extradition is not permitted. If the judicial officer does issue a certification of extraditability, the Secretary of State then decides "whether under all the circumstances affecting the case, both of a public and private nature, the warrant of surrender should issue." 6 M. Whiteman, *supra*, at 1027 (quoting 1912 Department of State legal memorandum). The Secretary of State has full discretion to decline to surrender the fugitive on some or all counts, or to set conditions on the surrender.[2]

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[1] The extradition statute does not provide for a judicial officer to order the Secretary of State to extradite an individual, any more than Rule 5.1 authorizes a judicial officer, upon finding probable cause, to order the government to prosecute. Instead, the judicial officer simply certifies that there is (or is not) a sufficient legal basis to hold the fugitive for surrender under the applicable extradition treaty.

[2] See, *e.g.*, *Escobedo* v. *United States*, 623 F.2d 1098, 1105 (5th Cir.), cert. denied, 449 U.S. 1036 (1980) and 450 U.S. 922 (1981); *Shapiro* v.

Because Section 3184 assigns extradition responsibilities to specific judicial officers, rather than to courts, the extradition rulings of federal judges and magistrates are not decisions of "district courts" within the meaning of 28 U.S.C. 1291. *Austin* v. *Healey*, 5 F.3d 598, 603-604 (2d Cir. 1993), cert. denied, 510 U.S. 1165 (1994); *Mackin*, 668 F.2d at 125-130 (Friendly, J.); *Jimenez* v. *Aristeguieta*, 290 F.2d 106, 107 (5th Cir. 1961). As a result, a judicial officer's certification of extraditability is not subject to appellate review. *Collins* v. *Miller*, 252 U.S. 364, 369 (1920). A fugitive may obtain further review through a petition for a writ of habeas corpus, *ibid.*, in which he may raise constitutional challenges and contest the jurisdiction of the extradition court, the validity and scope of the treaty, and whether the finding of extraditability is supported by probable cause. See *Fernandez* v. *Phillips*, 268 U.S. 311, 312 (1925).

2. Petitioner is a naturalized American citizen who emigrated to the United States from Italy. In 1993, petitioner was convicted by an Italian court of participating in a conspiracy to ship cocaine from Colombia to Italy, in violation of specified provisions of the Italian Penal Code. Pet. App. 2a, 23a, 27a. The evidence introduced at petitioner's trial showed that petitioner was a member of the Sicilian Mafia and that he participated in narcotics

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Secretary of State, 499 F.2d 527, 531 (D.C. Cir. 1974), aff'd on other grounds, 424 U.S. 614 (1976); 6 M. Whiteman, *supra*, at 1026-1028; 1 J. Moore, *supra*, at 555-570; Note, *Executive Discretion in Extradition*, 62 Colum. L. Rev. 1313 (1962). The extradition statute preserves that discretion by providing that the Secretary "may," rather than "shall," issue a warrant surrendering the individual. 18 U.S.C. 3184, 3186. The Secretary has discretion, however, only in refusing to extradite. He may withhold surrender if the judicial officer issues a certification of extraditability, but he may not grant surrender if the judicial officer refuses to issue a certification.

trafficking from 1983 to 1988, including one shipment of more than half a ton of cocaine. *Ibid.* Petitioner, who was living in New York at the time of the trial and chose not to attend the trial, was represented in all phases of the proceedings by an Italian attorney. *Id.* at 27a.

In May 1994, in response to a request by the government of Italy, the United States filed an extradition complaint. Pet. App. 28a. A federal magistrate judge issued a warrant for petitioner's provisional arrest, and a different magistrate judge determined that petitioner was extraditable under the pertinent treaty. *Id.* at 28a-33a. Petitioner challenged that determination by filing a petition for a writ of habeas corpus in the district court. Applying a de novo standard of review, the district court ruled that none of petitioner's objections to extradition had merit. *Id.* at 34a-53a.[3]

On appeal, petitioner asserted for the first time that the federal extradition statute is unconstitutional. See Pet. App. 7a. Petitioner presented the court of appeals with two alternative, mutually exclusive sets of constitutional claims. See Pet. 3. One set of claims rested on the premise that judicial officers acting under the extradition statute are exercising "the judicial Power of the United States" under Article III. Starting from that premise, petitioner argued that the Secretary of State's authority to withhold surrender of a fugitive following a judicial certification of extraditability (see p. 6, *supra*) constitutes impermissible "executive revision" of the judgments of Article III courts. Starting from the same premise, petitioner further argued that extradition proceedings

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[3] Petitioner did not contest the constitutionality of the federal extradition statute in the proceedings before the magistrate judge or the district court, nor did he object to the assignment of the extradition hearing to a magistrate rather than an Article III judge.

must be conducted by Article III judges, rather than (as in petitioner's case) non-Article III magistrate judges.

The court of appeals rejected the premise of those claims. It held that judges and magistrates acting under the extradition statute are not exercising "judicial Power" in the Article III sense. Pet. App. 8a-15a. The court followed the past rulings of the First, Second, and Eleventh Circuits. See *Austin* v. *Healey*, 5 F.3d 598, 603 (2d Cir. 1993), cert. denied, 510 U.S. 1165 (1994); *In re Howard*, 996 F.2d 1320, 1325 (1st Cir. 1993); *Martin* v. *Warden, Atlanta Penitentiary*, 993 F.2d 824, 828 (11th Cir. 1993). See also *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 59 U.S. (18 How.) 272, 280 (1856) ("the act * * * of a commissioner who makes a certificate for the extradition of a criminal, under a treaty, is judicial" in the "enlarged sense" that it "involve[s] the exercise of judgment upon law and fact," "[b]ut [that] is not sufficient to bring such matters under the judicial power" under Article III) (dictum). Having rejected petitioner's Article III premise, the court of appeals had no occasion to address further the claims that depended on that premise.

Petitioner's remaining claims assumed, as the court held, that the extradition tasks performed by judicial officers do not involve the exercise of "judicial power" in the Article III sense. Starting from that proposition, petitioner argued that those tasks cannot be assigned to Article III courts or judges. Petitioner further argued that the extradition statute violates the Appointments Clause by providing for federal judges to perform non-Article III tasks without a second appointment. The court of appeals agreed that, under this Court's precedents, "Congress may not expand the jurisdiction of federal courts beyond the limits established by Article III." Pet. App. 16a. The court held, however, that the extradition

statute does not violate that principle because it is not a grant of jurisdiction to the federal courts. Rather, the statute assigns extradition responsibilities to "individual justices, judges, and magistrate judges." *Id.* at 17a.

Turning to the claim that federal judges cannot be assigned non-Article III responsibilities, the court of appeals pointed out that petitioner's own extradition proceedings had been conducted by magistrate judges, who are not Article III officers and therefore are not subject to the constitutional limitations invoked by petitioner. Pet. App. 17a. The court further held that, in any event, the extradition statute satisfies the standards set forth in *Mistretta* v. *United States*, 488 U.S. 361 (1989), for the performance of non-Article III tasks by federal judges. Pet. App. 17a-20a. Finally, the court held that the statute does not violate the Appointments Clause because the tasks performed by judicial officers under the statute are germane to their Article III responsibilities. *Id.* at 20a-21a.

ARGUMENT

The court of appeals correctly rejected petitioner's challenge to the constitutionality of the federal extradition statute. The decision below is consistent with more than a century of authority validating the constitutionality of the statute and the appropriateness of its procedures. The court's decision does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Petitioner challenges extradition practices that were adopted by Congress more than a century ago, that have since been employed on thousands of occasions, and that have been uniformly recognized as constitutional. Those extradition practices have not only received long-standing judicial approval, but they are modeled after the

even more venerable and well-established relationship between judicial officers and the Executive Branch in the realm of domestic law enforcement. See *Charlton*, 229 U.S. at 461; *Benson*, 127 U.S. at 463; *Kaine*, 55 U.S. (14 How.) at 113-114 (plurality opinion).

When prosecutors wish to detain a suspect to answer criminal charges, they ordinarily must apply to a magistrate for an arrest warrant. If the warrant issues and the suspect is detained, he thereafter may obtain a preliminary hearing before a magistrate to determine whether "there is probable cause to believe that an offense has been committed and that the defendant committed it." Fed. R. Crim. P. 5.1(a); see *Jaben* v. *United States*, 381 U.S. 214, 224 (1965) ("a magistrate is intended to make a neutral judgment that resort to further criminal process is justified"). If the magistrate does not find probable cause, the criminal complaint is dismissed and the defendant is set free. See Fed. R. Crim. P. 5.1(b). If probable cause is found, the Executive Branch may proceed, but it retains the discretion not to go forward if it decides that prosecution is no longer advisable. To our knowledge, no court has ever suggested that those traditional procedures present any separation of powers concerns in the domestic law enforcement context.[4]

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[4] The absence of any dispute is unremarkable, for "[t]he ultimate purpose of th[e] separation of powers is to protect the liberty and security of the governed." *Metropolitan Washington Airports Auth.* v. *Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991). The role played by judicial officers in overseeing the arrest and commitment of criminal defendants is part and parcel of that constitutional enterprise, for it ensures that individuals are not detained to answer criminal charges unless a neutral and detached magistrate is satisfied with the legal and factual bases for the charges. The Executive Branch's discretion to discontinue a prosecution following the

The federal extradition statute employs those same procedures, and it is likewise constitutional. Indeed, before the enactment of the federal extradition statute, this Court had endorsed the use of such procedures in the extradition setting. See *In re Metzger*, 46 U.S. (5 How.) 175, 188-189 (1847) (Executive Branch "very properly" submitted extradition request to federal judge "at his chambers" to determine "[w]hether the crime charged is sufficiently proved, and comes within the treaty"; "[t]he arrest which followed, and the committal of the accused, subject to the order of the executive, seems to be the most appropriate, if not the only, mode of giving effect to the treaty."). And, with the exception of an aberrant district court decision that has since been vacated, every court that has addressed the issue has upheld the constitutionality of the federal law. See *United States* v. *Doherty*, 786 F.2d 491, 499 & nn.10-11 (2d Cir. 1986) (Friendly, J.); *Jimenez* v. *Aristeguieta*, 311 F.2d 547, 555 (5th Cir. 1962); *Sandhu* v. *Bransom*, 932 F. Supp. 822 (N.D. Tex. 1996); *In re Extradition of Marzook*, 924 F. Supp. 565 (S.D.N.Y. 1996); *Werner* v. *Hickey*, 920 F. Supp. 1257 (M.D. Fla. 1996); *In re Extradition of Lin*, 915 F. Supp. 206 (D. Guam 1995); *In re Extradition of Lang*, 905 F. Supp. 1385 (C.D. Cal. 1995); *In re Extradition of Sutton*, 905 F. Supp. 631 (E.D. Mo. 1995); *Cherry* v. *Warden, Metropolitan Correctional Ctr.*, No. 95 Cr. Misc. 1 P.7(LB), 1995 WL 598986 (S.D.N.Y. Oct. 11, 1995); *Carreno* v. *Johnson*, 899 F. Supp. 624 (S.D. Fla. 1995).[5]

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finding of probable cause can work only to the benefit, and not to the detriment, of the defendant.

[5] In *Lobue* v. *Christopher*, 893 F. Supp. 65 (D.D.C. 1995), vacated, 82 F.3d 1081 (D.C. Cir. 1996), a district court held that the Secretary of State's authority to withhold surrender following a judicial certification of extraditability constitutes impermissible "executive revision." See 893 F. Supp. at 70-76. The D.C. Circuit vacated that decision on

2. As noted above, petitioner's constitutional objections to the extradition statute fall into two mutually exclusive categories—those that assume that judicial officers acting under the statute are not exercising the "judicial Power of the United States," and those that make the contrary assumption. The petition does not address which of those conflicting premises is correct, and it does not ask this Court to choose between them. Instead, petitioner argues that the statute is unconstitutional in either event. We agree that it is unnecessary to resolve the "judicial power" issue in order to dispose of this case, but for the opposite reason: Regardless of whether the extradition statute does or does not involve the exercise of Article III judicial power, the statute is constitutional.

a. Petitioner first claims (Pet. 6-12) that the extradition statute violates the separation of powers doctrine by vesting federal courts with jurisdiction over non-Article III controversies. As the court of appeals pointed out, however, the extradition statute does not purport to grant subject matter jurisdiction to the federal courts. Instead, by its terms, it assigns extradition responsibilities to specified judicial officers, including "any justice or judge of the United States," and "any magistrate authorized [to act] by a court of the United States." 18 U.S.C. 3184.

As a textual matter, the reference to "judge[s] of the United States" does not constitute a grant of jurisdiction to the district courts (or the courts of appeals), any more than the corresponding reference to "justice[s] * * * of the United States" constitutes a grant of original jurisdiction to this Court. See *Doherty*, 786 F.2d at 499 & nn.

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jurisdictional grounds. See 82 F.3d at 1082. Every court that has addressed the merits of the district court's reasoning in *Lobue* has rejected it. We address the "executive revision" theory at pp. 20-23, *infra*.

10-11 (Friendly, J.).[6] Because the statute does not purport to act as a jurisdictional grant, it does not conflict with the principle that "Congress [can]not expand the jurisdiction of the federal courts beyond the bounds of Article III." *Seminole Tribe of Florida* v. *Florida*, 116 S. Ct. 1114, 1128 (1996).[7]

Petitioner argues (Pet. 9-11) that the court of appeals' distinction between courts and judges turns Article III's jurisdictional limitations into a dead letter by allowing Congress to recast inappropriate grants of jurisdiction as assignments of power to individual judges. That assertion is incorrect. This Court has recognized that the Constitution imposes limitations on the power of Congress to assign Article III judges tasks apart from those specified in Article III. See, *e.g.*, *Mistretta*, 488 U.S. at 397-408.

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[6] If Congress's reference to "judge[s] of the United States" were read as a grant of jurisdiction to lower federal courts, then the reference to "justice[s] of the United States" would amount to a grant of original jurisdiction to this Court. But under *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803), Congress cannot expand the original jurisdiction of this Court beyond that granted by Article III, and Article III does not vest this Court with original jurisdiction over extradition controversies. Petitioner's reading of the statutory language thus creates an independent constitutional problem that the Second Circuit's reading of the statute avoids.

[7] Contrary to petitioner's suggestion (Pet. 11), there is no conflict between the reasoning of the court of appeals and this Court's decision in *Metropolitan Washington Airports Auth.*, *supra*. The Court held in that case that Congress could not arrogate Article II functions to itself by assigning them to a commission whose membership was limited to members of Congress serving *ex officio*. 501 U.S. at 265-277. Looking to the structure and legislative history of the enabling statute, the Court concluded that the members of Congress appointed to the commission "act in their official congressional capacity" and constitute "a congressional agent" for separation of powers purposes. *Id.* at 267. The extradition statute does not present any analogous situation of one branch assigning the powers of another branch to itself.

Those limitations, which we discuss below, pp. 16-19, *infra*, ensure that Article III retains its vitality in defining the role of the federal judiciary.

Petitioner also argues (Pet. 6-8) that, purely as a matter of statutory construction, the extradition statute should be read as a jurisdictional provision. He bases that argument on the original language of the statute, which provided that the designated judicial officers were "vested with power, jurisdiction, and authority" to issue arrest warrants and hold extradition hearings. 9 Stat. 302. Petitioner argues that the quoted language, which no longer appears in the statute, expresses a grant of subject matter jurisdiction to the federal courts. According to petitioner, Congress selected the language specifically to overrule this Court's jurisdictional ruling in *In re Metzger*, in which the Court held that it lacked appellate jurisdiction over a district judge's extradition order because the matter "was heard and decided by the district judge at his chambers, and not in court." 46 U.S. (5 How.) at 191.

The courts have rejected petitioner's interpretation. *Mackin*, 668 F.2d at 125-127. Congress's use of the quoted language had nothing to do with a desire to grant jurisdiction or overrule *Metzger*. Instead, Congress was simply copying the terms of the Webster-Ashburton Treaty, which was drafted and ratified five years before *Metzger* was decided. As noted above, the Webster-Ashburton Treaty vested judges and magistrates in both countries with "power, jurisdiction, and authority" to issue warrants and hold extradition hearings. 8 Stat. 576 (1842). Congress added that language verbatim when it drafted the extradition statute. Its choice was unremarkable, because the statute was (in Congress's words) meant to "giv[e] Effect" to the Webster-Ashburton treaty and other extradition agreements. 9 Stat. 302. If Con-

gress had wished to enact a jurisdictional statute that would overrule *Metzger*, it would have used specific language expressing that intent and not treaty language drafted long before *Metzger* was decided.[8]

b. Petitioner claims (Pet. 12-13) that, even if the extradition statute is properly understood as an assignment of powers to individual judicial officers rather than a jurisdictional grant to federal courts, the statute is unconstitutional under the standards set forth in *Mistretta*. The court of appeals correctly rejected that claim. As the court of appeals pointed out, the claim fails at the outset because petitioner's own extradition proceedings were conducted by magistrates and not by an Article III judge. Pet. App. 17a. Accordingly, petitioner's claim is irrelevant to the constitutionality of his own extradition.[9]

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[8] Likewise, nothing in the legislative history of the statute reflects an intent on the part of Congress to change *Metzger*. As explained above, Congress acted primarily "to enlarge the facilities to comply with our [treaty] obligations," 18 Cong. Globe 868 (1848) (Rep. Ingersoll), by ensuring the general availability of judicial officers to conduct extradition proceedings (see pp. 3-4, *supra*). Although one of the bill's sponsors did refer in passing to *Metzger*, he nowhere suggested that the statute was intended to supersede that decision. 18 Cong. Globe 1008 (1848) (Sen. Dayton) (*reprinted at* Pet. App. 88a); see *Mackin*, 668 F.2d at 126 & n.7 (Friendly, J.) ("Nothing on the face of the statute or its legislative history shows an intention to alter the Supreme Court's ruling" in *Metzger*, and Senator Dayton "did not intimate that the bill would alter the result of that case.").

[9] While federal magistrate judges act as "adjuncts" to Article III courts, they themselves are not Article III officers. See, *e.g.*, *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 79-80 (1982) (plurality opinion) (magistrates are "non-Art. III officers"); *Wingo* v. *Wedding*, 418 U.S. 461, 467 n.4 (1974) (magistrates are "outside the pale of Article III"); *Todd* v. *United States*, 158 U.S. 278, 283 (1895).

Moreover, even if petitioner's extradition proceedings had been conducted by an Article III judge, he still would not have a valid claim under *Mistretta*. Petitioner argues that *Mistretta* confines Article III judges to the performance of "non-adjudicatory" functions when they act outside the confines of Article III. See Pet. 12. In *Mistretta*, however, the non-adjudicatory nature of the Sentencing Commission was the source of the potential constitutional problem and not (as petitioner suggests) the solution. To resolve that issue, the Court turned to its general separation of powers inquiry, which "focus[es] on the extent to which a provision of law prevents [the affected] Branch from accomplishing its constitutionally assigned functions." 488 U.S. at 383 (quoting *Nixon* v. *Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1977)) (internal punctuation omitted). In order to safeguard the constitutional role of Article III courts, this Court has articulated the "general principle * * * [that] executive or administrative functions *of a nonjudicial nature* may not be imposed on judges holding office under Art. III of the Constitution." 488 U.S. at 385 (emphasis added and internal quotation marks omitted). The Court in *Mistretta* analyzed whether the statute came within an "exception[] to this general rule," *id.* at 386, and found that it did. The extradition statute assigns judges tasks that are more conventionally "judicial" in nature. Hence, it follows that, even if *Mistretta* applies in this context, the extradition statute would also fall within the exception to the general rule.

Petitioner's argument also overlooks *Mistretta*'s analysis of *United States* v. *Ferreira*, 54 U.S. (13 How.) 40 (1852). See 488 U.S. at 403. *Ferreira* involved a statute that required a federal district judge in Florida to hear certain claims against the United States under a treaty with Spain. The judge's determinations were to be

reported to the Secretary of the Treasury, who would decide whether or not to pay the claims. This Court concluded in *Ferreira* that the powers conferred on the judge were "judicial in their nature," but were not part of the "judicial Power of the United States," 54 U.S. (13 How.) at 48, and hence not within the Court's appellate jurisdiction, because the judge's decisions were subject to revision by an Executive Branch officer.

In *Mistretta*, the Court took pains to point out that the underlying assignment to the district judge in *Ferreira* did not itself violate the separation of powers doctrine. See 488 U.S. at 403 ("[W]e expressed general agreement [in *Ferreira*] with the view * * * [that] such duties could be assigned to judges acting individually as commissioners."). As *Mistretta* explains, "*Ferreira* * * * suggests that Congress *may* authorize a federal judge, in an individual capacity, to perform an executive function without violating the separation of powers [doctrine]." *Ibid.* (emphasis added). Given that the district judge's role in *Ferreira* was, in this Court's words, "judicial in nature," 54 U.S. (13 How.) at 48, neither *Ferreira* nor *Mistretta* can be reconciled with petitioner's suggestion that Article III judges are limited to non-adjudicatory functions when they act outside the scope of Article III.

Petitioner also argues that *Mistretta* requires the exercise of non-Article III functions to be "voluntary" in the sense that the Article III judge may refuse to undertake them. *Mistretta*'s approval of the statute in *Ferreira* is at odds with a voluntariness requirement, for the district judge's exercise of the powers conferred in *Ferreira* was not voluntary; by its terms, the statute "*directed* [the judge] to receive and adjudicate" the claims. 9 Stat. 788 (emphasis added). In any event, as the court of appeals pointed out, the language of the extradition statute may readily be construed to give federal judges discretion over

whether to carry out the judicial functions provided under the statute. Pet. App. 19a; accord *Jimenez*, 311 F.2d at 555. Thus, even if voluntariness were a prerequisite under *Mistretta*, the extradition statute would satisfy that requirement.

Finally, petitioner asserts that judicial performance of a given non-Article III task is suspect under *Mistretta* to the extent that it "undermines public confidence in the disinterestedness of the Judicial Branch." *Mistretta*, 488 U.S. at 407. As the court of appeals pointed out (Pet. App. 19a-20a), however, federal judges have been carrying out their role under the extradition statute for nearly 150 years without "undermin[ing] public confidence" in the judiciary's disinterestedness.[10]

c. Petitioner asserts (Pet. 14-15) that if the extradition statute does not involve the exercise of "judicial Power" under Article III, then the statute violates the Appointments Clause by assigning non-Article III tasks to federal judges and magistrates without providing for a second appointment. As the court of appeals noted, however, an officer who has been appointed to an office in conformity with the Appointments Clause may thereafter be assigned additional functions, without the need for a second appointment, as long as the new functions are "germane" to those that the officer already performs. Pet. App. 20a-21a. See *Weiss* v. *United States*, 510 U.S. 163, 174 (1994); *Shoemaker* v. *United States*, 147 U.S. 282, 301 (1893). Here, as

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[10] There is nothing about the judicial role under the statute that would call into question the neutrality or disinterestedness of federal judges. To the contrary, judges acting under the statute perform their traditional role of protecting individuals against unlawful exercises of power by the Executive Branch. Judges traditionally have been given this kind of role precisely because they are neutral and disinterested, and that is why judicial officers play the same role under the extradition statute.

explained above, the duties performed by a judge or magistrate under the extradition statute are substantially the same as those performed by judges and magistrates in other preliminary criminal proceedings and are germane to the other functions assigned to federal judges and magistrates.[11]

3. Petitioner's remaining claims (Pet. 16-25) assume that the judicial role under the extradition statute involves the exercise of "judicial Power" under Article III. Because the court of appeals rejected that premise (Pet. App. 14a-15a), it did not have occasion to address those claims on their own terms. As we now show, those claims are without merit.

a. As noted above, the extradition statute vests the Secretary of State with discretion to withhold surrender of a fugitive after a judge or magistrate has certified that the fugitive is extraditable. See 18 U.S.C. 3184, 3186 (Secretary "may" surrender fugitive). According to petitioner, the Secretary of State's discretionary power to

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[11] There is another shortcoming to petitioner's Appointments Clause claim. The Appointments Clause precedents on which petitioner relies (Pet. 14-15) involve situations in which an officer of the United States is appointed to a second office, or is assigned additional powers that depart from the character of his existing office, *after* his original appointment. See *Mistretta*, 488 U.S. at 368 (sitting federal judges subsequently appointed to Sentencing Commission); *Ferreira*, 54 U.S. (13 How.) at 45-48 (sitting federal judge subsequent appointed to adjudicate foreign claims). Here, in contrast, the powers created by the extradition statute have been vested in federal judges and magistrates for nearly 150 years. Because extradition powers were part of the existing "job description" of federal judges and magistrates at the time that all current occupants of those offices were appointed, those powers were embraced in the original appointments. In some cases the Appointments Clause may require two appointments for two offices, but it can hardly be thought to require two appointments for one existing office.

withhold surrender turns the judge's or magistrate's extraditability ruling into a "nonbinding, unenforceable advisory opinion[]" (Pet. 16) and thereby violates Article III and the separation of powers doctrine under *Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792), and later decisions.

Petitioner's claim is without merit. As explained above (see pp. 11-12, *supra*), the relationship between judicial officers and the Executive Branch under the extradition statute is precisely the same as that in other preliminary criminal proceedings, such as probable cause hearings under Fed. R. Crim. P. 5.1. In each instance, the judicial officer protects individual liberty by determining whether it is lawful for the Executive Branch to proceed against the individual. If the judicial officer determines that probable cause has not been established, the Executive Branch may not go forward (unless it resubmits the matter to another judicial officer and obtains a favorable judicial determination). If the judicial officer instead determines that probable cause has been shown, the Executive Branch is authorized to proceed, but retains the discretion not to do so. The result is a "dual key" system in which the individual is protected by the separate exercise of distinct executive and judicial functions.

Petitioner does not suggest that this dual approval system violates Article III or the separation of powers doctrine when it is employed in other preliminary criminal proceedings, such as probable cause hearings under Rule 5.1. Indeed, separation of powers problems would arise if the Executive Branch were *denied* discretion in these matters and were compelled to execute a warrant that a reasonable officer believed was not backed by probable cause. In similar fashion, the government cannot be compelled to prosecute a case that it believes is not worthy of prosecution, regardless of whether a judicial officer determined that it was. See, *e.g.*, *United States* v. *Cox*, 342

F.2d 167, 171 (5th Cir.) (en banc) ("as an incident of the constitutional separation of powers, * * * the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions"), cert. denied, 381 U.S. 935 (1965); *Dacey* v. *Dorsey*, 568 F.2d 275, 277 (2d Cir.), cert. denied, 436 U.S. 906 (1978). If executive discretion in these matters does not turn prior judicial probable cause determinations into unconstitutional "advisory opinions," neither does the same kind of executive discretion under the extradition statute.

Petitioner insists (Pet. 16-17) that the extradition statute "requires federal judges to issue 'dead letter' judgments * * * without force or effect." That is incorrect. If a judge or magistrate declines to issue a certification of extraditability, the Secretary of State is foreclosed from surrendering the fugitive. See p. 6, *supra*. The government may file a new extradition request, but unless and until the renewed request leads to a certification of extraditability by a judicial officer, the government may not extradite the individual. As a result, judicial rulings under the extradition statute are binding in a way that was manifestly not true in *Hayburn's Case*, where the Executive Branch was free to revise or disregard judicial decisions in favor of military pension claimants.

At a deeper level, petitioner's claim ignores the basic logic of the separation of powers doctrine. The separation of powers protects individual liberty by ensuring that the distinct roles and functions of each branch are "safeguard[ed] against the encroachment or aggrandizement" of the other branches. *Buckley* v. *Valeo*, 424 U.S. 1, 122 (1976). The extradition statute does not present the risk of "encroachment or aggrandizement" that the separation of powers doctrine is designed to prevent. To the contrary, the statute's requirement that both judicial and

executive officers approve an extradition request points in precisely the opposite direction. Each branch involved in the extradition process has independent authority to block the surrender of a fugitive, and neither branch intrudes on the other when it exercises that authority. Instead, the dual approval mechanism maximizes the protection accorded to individuals. The statutory scheme is thus consistent, on the most fundamental level, with the values that lie at the heart of the separation of powers doctrine. See *Mistretta*, 488 U.S. at 381 ("the greatest security against tyranny—the accumulation of excessive authority in a single Branch—lies not in a hermetic division among the Branches, but in a carefully crafted system of checked and balanced power within each Branch").

b. Petitioner also contends that responsibility for conducting extradition proceedings cannot, consistently with Article III, be assigned to federal magistrates. That claim has been addressed previously by two courts of appeals, both of which rejected it. *Ward*, 921 F.2d at 287-289 (Ginsburg, J.); *Austin*, 5 F.3d at 602-604. This Court denied a petition for a writ of certiorari in *Austin*, and there is no reason to follow a different course here.

Article III serves two distinct functions: first, "to protect 'the role of the independent judiciary within the constitutional scheme of tripartite government,'" and second, "to safeguard litigants' 'right to have claims decided before judges who are free from potential domination by other branches of government.'" *CFTC* v. *Schor*, 478 U.S. 833, 848 (1986) (citation omitted). Petitioner's challenge to the role of magistrates does not invoke the latter, rights-protecting function of Article III. To the contrary, petitioner expressly told the court of appeals below that he was "*not* present[ing] * * * an Article III personal rights claim in this Court." C.A. Appellant Supp. Reply Br. 2 n.2 (emphasis added); cf. *Schor*, 478 U.S. at 848 ("as a personal

right, Article III's guarantee of an impartial and independent federal adjudicator is subject to waiver"). As a result, the only question presented in this case is whether the assignment of extradition powers to magistrates conflicts with the structural concerns of Article III.

The conduct of extradition proceedings by magistrate judges, like the conduct of warrant applications, probable cause hearings, and other preliminary criminal proceedings, does not threaten the judiciary's role vis-à-vis the other branches of government. The judiciary retains complete control over the participation of magistrates in the extradition process. As already noted, the extradition statute permits magistrates to conduct extradition proceedings only when they are "authorized so to do by a court of the United States." 18 U.S.C. 3184. Moreover, when a court chooses to commit an extradition proceeding to a magistrate, the magistrate's decision is "subject to habeas corpus review by an Article III judge, with appellate review available thereafter." *Ward*, 921 F.2d at 288. Because magistrates may perform extradition functions only with the leave of the federal courts, and because the essential features of their extradition decisions are subject to review by those courts, there is "no potential for trespass" on the independence of the judiciary by the other branches of the federal government. *Austin*, 5 F.3d at 604; *Ward*, 921 F.2d at 287.

The lengthy pedigree of the extradition statute offers further confirmation that Article III is not violated by the participation of magistrate judges in extradition proceedings. Commissioners, the predecessors of today's magistrates, were authorized to conduct extradition hearings from the inception of the extradition statute in 1848, and such officers have done so ever since. The historical acceptance of that practice, without any indication that it has generated interbranch friction, strongly suggests

that the practice does not raise structural concerns under Article III.

Petitioner asserts (Pet. 19-21) that the decision below conflicts with this Court's decisions in *Gomez* v. *United States*, 490 U.S. 858 (1989), and *United States* v. *Raddatz*, 447 U.S. 667 (1980). In *Gomez*, this Court held that the federal Magistrates Act does not authorize the delegation to magistrates of jury selection in felony trials. Because of the statutory basis for its decision, the Court expressly declined to decide whether Article III permits a magistrate to preside over jury selection. 490 U.S. at 872 n.25. As a purely statutory decision, *Gomez* is irrelevant to the constitutional claim presented here, and its statutory holding has no relevance to the extradition statute, which expressly authorizes the participation of magistrates in extradition proceedings.

This Court's earlier decision in *Raddatz*, far from helping petitioner, actually undermines his Article III claim. In *Raddatz*, this Court rejected an Article III challenge to a magistrate's authority to hear a suppression motion in a criminal case and to make proposed findings and recommendations to the district court concerning the proper disposition of the motion. The Court held that the delegation of suppression hearings to a magistrate "does not violate Article III so long as the ultimate decision is made by the district court." 447 U.S. at 683. The Court emphasized that "the entire process takes place under the district court's total control and jurisdiction." *Id.* at 681. Here too, magistrates act under the authority of the district courts, and a magistrate's decision in an extradition hearing is subject to review by an Article III court in a habeas corpus proceeding. See also *id.* at 685 (Blackmun, J., concurring) (because magistrate is subject to control of Article III court, "the only conceivable danger of a 'threat' to the 'independence' of the magistrate comes

from within, rather than without, the judicial department").

Petitioner also asserts that the decision below conflicts with the decisions of other courts of appeals regarding the permissible role of magistrates under Article III. None of the decisions cited by petitioner (Pet. 23-24) involves the role of magistrates under the extradition statute. Moreover, all but one of them are statutory decisions turning on the scope of the Magistrates Act, and are therefore inapposite for the same reasons that *Gomez* is. The remaining case, *United States* v. *Colacurcio*, 84 F.3d 326 (9th Cir. 1996), holds that a defendant's personal rights under Article III would be violated if his probation revocation hearing were conducted by a magistrate without his consent. *Id.* at 333-334. *Colacurcio* does not address the role of magistrates in extradition proceedings, and it rests on concerns about personal rights that petitioner has not raised in this case.[12]

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[12] Petitioner also asserts that the decision below conflicts with this Court's decision in *Ng Fung Ho* v. *White*, 259 U.S. 276 (1922). *Ng Fung Ho* holds that the Due Process Clause of the Fifth Amendment entitles a resident of the United States to a judicial determination of citizenship before the government can deport him as an alien. *Id.* at 284-285. In this case, petitioner never asserted a claim under the Due Process Clause. In any event, nothing in *Ng Fung Ho* casts doubt on the use of magistrates in extradition proceedings. See *Ward*, 921 F.2d at 288 n.4. Because a citizen cannot be deported, a deportation order constitutes a binding determination that a deportee is not a citizen. By contrast, a certification of extraditability does not divest the defendant of his citizenship; it merely constitutes a determination that there is sufficient evidence to warrant the individual's surrender to answer criminal charges abroad.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
DOUGLAS N. LETTER
SCOTT R. MCINTOSH
Attorneys

NOVEMBER 1996